

## CHAPTER 03 - HEARINGS DIVISION

### SECTION .0100 - HEARING PROCEDURES

#### 26 NCAC 03 .0101 GENERAL

(a) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

(b) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings in the OAH electronic filing system (e-OAH), by facsimile (fax), or by electronic mail with an attached file either in PDF format or a document compatible with the most recent version of Microsoft Word. Faxed documents shall be sent to: (984) 236-1871. Electronic mail with attached file shall be sent by electronic transmission to: oah.clerks@oah.nc.gov. The faxed documents or electronic mail with attached file shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed filing and the appropriate filing fee (if a fee is required by G.S. 150B-23.2) are received by OAH within seven business days following the transmission of the faxed documents or electronic mail with attached file. Electronic mail without an attached file as specified in this Paragraph shall not constitute a valid filing with the Office of Administrative Hearings.

(c) Every pleading and other documents filed with OAH shall be signed by the attorney, mediator, or other party who prepared the document, and shall contain the preparer's name, mailing address, electronic mail address, and telephone number. Documents prepared by an attorney shall have the attorney's North Carolina State Bar number.

(d) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

*History Note: Authority G.S. 7A-750; 7A-751(a); 150B-23.2; 150B-23.3; 150B-40(c); Eff. August 1, 1986; Amended Eff. May 1, 2009; January 1, 2006; April 1, 2004; April 1, 2001; August 1, 2000; February 1, 1994; July 1, 1992; May 1, 1989; January 1, 1989; Emergency Amendment Eff. October 1, 2009; Temporary Amendment Eff. December 1, 2009; Amended Eff. October 1, 2010; Temporary Amendment Eff. January 1, 2012; Amended Eff. March 1, 2016; November 1, 2012; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016; Amended Eff. October 1, 2022.*

#### 26 NCAC 03 .0102 DEFINITIONS AND CONSTRUCTION

(a) The definitions contained in G.S. 150B-2 are incorporated herein by reference. In addition, the following definitions apply:

- (1) "Chief Administrative Law Judge" means the person appointed according to G.S. 7A-752.
- (2) "File" or "Filing" means:
  - (A) to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Office of Administrative Hearings, and acceptance thereof by the clerk, except that when a party submits a document for filing to the administrative law judge during the course of a contested case hearing and the filing is accepted by the administrative law judge, the judge shall note thereon the filing date. All documents filed with the Office of Administrative Hearings, except exhibits, shall be in letter size 8 1/2" by 11"; or
  - (B) electronic filing as defined in 26 NCAC 03 .0501(1).
- (3) "Service" or "Serve" means:
  - (A) delivery by electronic mail with an attached file in a format that is readily accessible to the recipient;
  - (B) delivery by facsimile (fax);
  - (C) personal delivery;
  - (D) delivery by first class United States Postal Service mail;

- (E) delivery by overnight express mail service; or
- (F) electronic service as defined in 26 NCAC 03 .0501(4).

(b) A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules.

(c) Service by mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service.

(d) Service by overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in the custody of an overnight express mail service.

(e) Service by electronic mail or fax shall be deemed to occur one hour after it is sent, provided that:

- (1) documents sent after 5 pm are deemed sent at 8 am the following business day; and
- (2) documents sent by electronic mail or fax that are not readable by the recipient are not deemed served. Within five business days of receipt of an unreadable document, the receiving party shall notify the sending party of the unreadability of the document.

Service by electronic mail or fax is treated the same as service by mail for the purpose of adding three days to the prescribed period to respond under Rule 6(e) of the Rules of Civil Procedure as contained in G.S. 1A-1.

(f) The rules of statutory construction contained in Chapter 12 of the General Statutes shall be applied in the construction of these Rules.

*History Note: Authority G.S. 7A-752; 150B-23; 150B-23.3; Eff. August 1, 1986; Amended Eff. October 1, 1991; January 1, 1989; November 1, 1987; September 1, 1986; Temporary Amendment Eff. January 1, 2012; Amended Eff. March 1, 2016; November 1, 2012; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

#### **26 NCAC 03 .0103 COMMENCEMENT OF CONTESTED CASE: NOTICE AND FILING FEE**

(a) Within five days of filing a petition to commence a contested case, the Chief Administrative Law Judge shall assign an administrative law judge to the case. Within ten days of the filing of a petition commencing a contested case, the Chief Hearings Clerk of the Office of Administrative Hearings shall serve a Notice of Contested Case Filing and Assignment upon all who are parties to the dispute. The notice shall contain the following:

- (1) name of case and date of filing;
- (2) name, address, and telephone number of the assigned administrative law judge; and
- (3) a request that the party send within 30 days a copy of the document constituting the agency action that caused the filing of the petition or a written explanation of why the petitioner is a party or person aggrieved if a document constituting the agency action does not exist.

(b) In contested cases commenced by a person aggrieved involving the following causes of action, the petitioner shall pay a filing fee of one hundred twenty-five dollars (\$125.00):

- (1) contested cases challenging certificate of need filed pursuant to G.S. 131E-188;
- (2) contested cases challenging permit actions under G.S. 143-215.1, G.S. 143-215.10C, G.S. 143-215.15, and G.S. 143-215.108; and
- (3) contested cases where the amount in controversy is fifty thousand dollars (\$50,000) or greater.

(c) In contested cases commenced by a person aggrieved that do not involve the causes of action listed in Paragraph (b) of this Rule, the petitioner shall pay a fee of twenty dollars (\$20.00).

(d) The filing fee shall be waived in a contested case involving a mandated federal cause of action. Examples of federal causes of action include cases involving Medicaid, foster care, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), Special Education/IDEA, the Health Care Personnel Registry, and the Supplemental Nutrition Assistance Program (SNAP).

(e) When filing a petition for a contested case, the petitioner shall simultaneously submit the filing fee or a request to proceed in forma pauperis.

- (1) If the filing fee is not paid or is paid in an incorrect amount at the time of filing, the Office of Administrative Hearings shall notify the petitioner in writing and permit a late payment of the filing fee to be made within 60 days of the date the petition was filed. If the filing fee is not paid within 60 days of the date of filing, the petition may be dismissed pursuant to G.S. 150B-33(b)(10).

- (2) To proceed in forma pauperis, a petitioner shall submit an affidavit on a form provided by OAH containing the substantive requirements listed in G.S. 1-110(a). Late forms shall be accepted within the timeframe set in Subparagraph (e)(1) of this Rule.
- (h) The filing fee shall be refunded when Rule .0105(7) of this Section applies.
- (i) The method of payment of the filing fee shall be:
  - (1) cash;
  - (2) money order;
  - (3) certified check;
  - (4) check drawn on an attorney's trust or operating account; or
  - (5) credit or debit card if the petition is filed electronically.

*History Note:* Authority G.S. 150B-23; 150B-23.2; 150B-33;  
Eff. August 1, 1986;  
Amended Eff. October 1, 1991; November 1, 1987; September 1, 1986;  
Emergency Amendment Eff. October 1, 2009;  
Temporary Amendment Eff. December 1, 2009;  
Amended Eff. June 1, 2014; October 1, 2010;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. April 1, 2023.

#### **26 NCAC 03 .0104 ORDER FOR PREHEARING STATEMENTS**

The administrative law judge may serve all parties with an Order for Prehearing Statements together with, or after service of, the Notice of Contested Case Filing and Assignment. The parties thus served shall, within 30 days of service, file the requested statements setting out the party's present position on the following:

- (1) The nature of the proceeding and the issues to be resolved;
- (2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute;
- (3) A list of proposed witnesses with a brief description of his or her proposed testimony;
- (4) A description of what discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discovery;
- (5) Venue considerations;
- (6) Estimation of length of the hearing;
- (7) The name, address, and telephone number of the party's attorney, if any; and
- (8) Other special matters.

*History Note:* Authority G.S. 150B-33;  
Eff. August 1, 1986;  
Amended Eff. October 1, 1991; November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

#### **26 NCAC 03 .0105 DUTIES OF THE ADMINISTRATIVE LAW JUDGE**

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and G.S. 150B-34, the administrative law judge shall perform the following duties, consistent with law:

- (1) Hear and rule on motions;
- (2) Grant or deny continuances;
- (3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
- (4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;
- (5) Make preliminary, interlocutory, or other orders as deemed appropriate;
- (6) Grant dismissal when the case or any part thereof has become moot or for other reasons;
- (7) Order the State of North Carolina, when it is the losing party as determined by the presiding Administrative Law Judge, to reimburse the filing fee to the petitioner; and
- (8) Apply sanctions in accordance with Rule .0114 of this Section.

*History Note:* Authority G.S. 7A-751(a); 8C-1, Rule 614; 150B-23.2; 150B-33; 150B-34;  
Eff. August 1, 1986;  
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987;  
Emergency Amendment Eff. October 1, 2009;  
Temporary Amendment Eff. December 1, 2009;  
Amended Eff. October 1, 2010;  
Temporary Amendment Eff. January 1, 2012;  
Amended Eff. November 1, 2012;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**26 NCAC 03 .0106 CONSENT ORDER: SETTLEMENT: STIPULATION**

- (a) Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement, or consent order at any time during the proceedings. Parties may enter into such agreements on their own or may ask for a settlement conference with an administrative law judge to promote consensual disposition of the case.
- (b) If an agency enters into a settlement agreement after the commencement of a contested case, the agency shall file a copy of the settlement agreement with OAH. The settlement agreement shall be included in the official record of the contested case consistent with G.S. 132-1.3.

*History Note:* Authority G.S. 7A-750; 7A-751; 150B-31(b); 150B-37;  
Eff. August 1, 1986;  
Amended Eff. November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. September 1, 2023.

**26 NCAC 03 .0107 SETTLEMENT CONFERENCE**

- (a) A settlement conference is for the primary purpose of assisting the parties in resolving disputes and for the secondary purpose of narrowing the issues and preparing for hearing.
- (b) A settlement conference shall be held at the request of any party, the administrative law judge, or the Chief Administrative Law Judge. Upon receipt of the request, the Chief Administrative Law Judge shall assign the case to another administrative law judge for the purpose of conducting a settlement conference. Unless both parties and the administrative law judge agree, a unilateral request for a settlement conference shall not constitute good cause for a continuance. The conference shall be conducted at a time and place agreeable to all parties and the administrative law judge. It shall be conducted by telephone if any party would be required to travel more than 50 miles to attend, unless that party agrees to travel to the location set for the conference. If a telephone conference is scheduled, the parties must be available by telephone at the time of the conference.
- (c) All parties shall attend or be represented at a settlement conference under the same requirements as provided for in a mediation settlement conference under Rule .0204(a) of this Chapter. Parties or their representatives shall be prepared to participate in settlement discussions.
- (d) The parties shall discuss the possibility of settlement before a settlement conference if they believe that a reasonable basis for settlement exists.
- (e) At the settlement conference, the parties shall be prepared to provide information and to discuss all matters required in Rule .0104 of this Section.
- (f) If, following a settlement conference, a settlement has not been reached but the parties have reached an agreement on any facts or other issues, the administrative law judge presiding over the settlement conference shall issue an order confirming and approving, if necessary, those matters agreed upon. The order is binding on the administrative law judge who is assigned to hear the case.

*History Note:* Authority G.S. 7A-751(a); 150B-22; 150B-31(b);  
Eff. August 1, 1986;  
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987; September 1, 1986;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**26 NCAC 03 .0108 PREHEARING CONFERENCE**

(a) The purpose of the prehearing conference is to simplify the issues to be determined, to obtain stipulations in regard to foundations for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, to determine deadlines for the completion of any discovery, to establish hearing dates and locations if not previously set, to consider such other matters that may be necessary or advisable and, if possible, to reach a settlement without the necessity for further hearing. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

(b) Upon the request of any party or upon the administrative law judge's own motion, the administrative law judge may hold a prehearing conference prior to a contested case hearing. The administrative law judge may require the parties to file prehearing statements in accordance with Rule .0104 of this Section. A prehearing conference shall be an informal proceeding conducted expeditiously by the administrative law judge. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of an order by the administrative law judge. Venue for purposes of a prehearing conference shall be determined in accordance with G.S. 150B-24.

*History Note:* Authority G.S. 150B-33(b)(4),(5);  
Eff. August 1, 1986;  
Amended Eff. February 1, 1994; April 1, 1990; November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**26 NCAC 03 .0109 NOTICE OF HEARING**  
**26 NCAC 03 .0110 DISQUALIFICATION OF ADMINISTRATIVE LAW JUDGE**

*History Note:* Authority G.S. 150B-23; 150B-32(b);  
Eff. August 1, 1986;  
Amended Eff. October 1, 1991; November 1, 1987;  
Expired Eff. August 1, 2016 pursuant to G.S. 150B-21.3A.

**26 NCAC 03 .0111 CONSOLIDATION OF CASES**

(a) The Chief Administrative Law Judge of the Office of Administrative Hearings may order a joint hearing of any matters at issue in contested cases involving common questions of law or fact or multiple proceedings involving the same or related parties, or may order the cases consolidated or make other orders to reduce costs or delay in the proceedings.

(b) A party requesting consolidation shall serve a petition for consolidation on all parties to the cases to be consolidated and shall file the original with the Office of Administrative Hearings, together with a Certificate of Service showing service on all parties as herein required. Any party objecting to the petition shall serve and file his objections within 10 days after service of the petition for consolidation.

(c) Upon determining whether cases should be consolidated, the Chief Administrative Law Judge shall serve a written order on all parties which contains a description of the cases for consolidation and the reasons for the decision.

(d) Nothing contained in this Rule shall be deemed to prohibit the parties from stipulating and agreeing to a consolidation which shall be granted upon submission of a written stipulation signed by all the parties to the Chief Administrative Law Judge.

(e) Following receipt of a notice of or order for consolidation, any party may petition for severance by serving it on all other parties and filing it with the Office of Administrative Hearings at least seven days prior to the first scheduled hearing date. If the Chief Administrative Law Judge finds that the consolidation will prejudice any party, he shall order the severance or other relief which will prevent the prejudice from occurring.

*History Note:* Authority G.S. 150B-23; 150B-31;  
Eff. August 1, 1986;  
Amended Eff. January 1, 1987; September 1, 1986;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**26 NCAC 03 .0112 DISCOVERY**

(a) Any means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1, is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may file a motion with the administrative law judge to obtain an order compelling discovery. In the disposition of the motion, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues in controversy are significant enough to warrant the discovery.

(b) When a party serves another party with a Request for Discovery, that request need not be filed with the Office of Administrative Hearings but shall be served upon all parties.

(c) The parties in any contested case shall voluntarily exchange information upon filing the contested case, seek access as provided by law to public documents, and exhaust other informal means of obtaining discoverable material within the timeframe set in the scheduling order.

All discovery shall be completed no later than the first day of the contested case hearing.

(d) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall:

- (1) move for relief from the request;
- (2) provide the requested information, material or access; or
- (3) offer a schedule for reasonable compliance with the request.

(e) Sanctions for failure of a party to comply with an order of the administrative law judge made pursuant to the discovery rules of this Chapter shall be as provided for by G.S. 1A-1, Rule 37 and Rule .0114 of this Section.

*History Note:* Authority G.S. 1A-1, Rule 5; 150B-28; 150B-33(b)(3)(4);  
Eff. August 1, 1986;  
Amended Eff. February 1, 1994; November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. April 1, 2023.

## **26 NCAC 03 .0113 SUBPOENAS**

(a) Subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45.

(b) A subpoena shall be served in the manner provided by G.S. 150B-27 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid by the party at whose request the witness appears. A party seeking an order imposing sanctions for failure to comply with any subpoena issued under this Rule must prove proper service of the subpoena.

(c) Objections to subpoenas shall be heard in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45.

*History Note:* Authority G.S. 150B-27; 150B-33;  
Eff. August 1, 1986;  
Amended Eff. October 1, 1991; November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

## **26 NCAC 03 .0114 SANCTIONS**

(a) If a party fails to appear at a hearing or fails to comply with an interlocutory order of an administrative law judge, the administrative law judge may:

- (1) Find that the allegations of or the issues set out in the notice of hearing or other pleading may be taken as true or deemed proved without further evidence;
- (2) Dismiss or grant the motion or petition;
- (3) Suppress a claim or defense; or
- (4) Exclude evidence.

(b) In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the administrative law judge presiding may enter a show cause order returnable in Superior Court for contempt proceedings in accordance with G.S. 150B-33(b)(8).

*History Note:* Authority G.S. 150B-25(a); 150B-33(b)(8),(10);  
Eff. August 1, 1986;

*Amended Eff. January 1, 1989; November 1, 1987; March 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23,  
2016.*

### **26 NCAC 03 .0115            MOTIONS**

(a) Any application to the administrative law judge for an order shall be by motion, which shall be in writing unless made during a hearing, and must be filed and served upon all parties not less than ten days before the hearing, if any, is to be held either on the motion or the merits of the case. The nonmoving party shall have ten days from the date of service of the motion to file a response. A response must be in writing. Motions practice in contested cases before the Office of Administrative Hearings shall be governed by Rule 6 of the General Rules of Practice for the Superior and District Courts.

(b) If any party desires a hearing on the motion, he shall make a request for a hearing at the time of the filing of his motion or response. A response shall set forth the nonmoving party's objections. All motions in writing shall be decided without oral argument unless an oral argument is directed by the administrative law judge. When oral argument is directed by the administrative law judge, a motion shall be considered submitted for disposition at the close of the argument. A hearing on a motion will be directed by the administrative law judge only if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. All orders on such motions, other than those made during the course of a hearing, shall be in writing and shall be served upon all parties of record not less than five days before a hearing, if any, is held.

*History Note:    Authority G.S. 150B-33(b);  
                         Eff. August 1, 1986;  
                         Amended Eff. November 1, 1987;  
                         Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23,  
                         2016.*

### **26 NCAC 03 .0116            TIME**

Unless otherwise provided in the rules of the Office of Administrative Hearings or in a specific statute, time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6.

*History Note:    Authority G.S. 150B-33(b)(4);  
                         Eff. August 1, 1986;  
                         Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23,  
                         2016.*

### **26 NCAC 03 .0117            INTERVENTION**

(a) Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall file a timely motion to intervene and shall serve the motion upon all existing parties. Timeliness will be determined by the administrative law judge in each case based on circumstances at the time of filing. The motion shall show how the movant's rights, duties, or privileges may be determined or affected by the contested case; shall show how the movant may be directly affected by the outcome or that movant's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate movant's statutory right to intervene if one should exist.

(b) Any party may object to the motion for intervention by filing a written notice of objection with the administrative law judge within five days of service of the motion if there is sufficient time before the hearing. The notice of objection shall state the party's reasons for objection and shall be served upon all parties. If there is insufficient time before the hearing for a written objection, the objection may be made at the hearing.

(c) When determined to be necessary to develop a full record on the question of intervention, the administrative law judge may conduct a hearing on the motion to determine specific standards that will apply to each intervenor and to define the extent of allowed intervention.

(d) The administrative law judge shall allow intervention upon a proper showing under this Rule, unless the administrative law judge finds that the movant's interest is adequately represented by one or more parties participating in the case or unless intervention is mandated by statute, rule, or court decision. An order allowing intervention shall specify the extent of participation permitted the intervenor and shall state the administrative law judge's reasons. An intervenor may be allowed to:

- (1) File a written brief without acquiring the status of a party;
- (2) Intervene as a party with all the rights of a party; or
- (3) Intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues.

*History Note: Authority G.S. 150B-23(d);  
Eff. August 1, 1986;  
Amended Eff. November 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

## **26 NCAC 03 .0118 CONTINUANCES**

(a) Requests for a continuance of a hearing shall be granted upon a showing of good cause or extraordinary cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing to the administrative law judge and shall be served upon all parties of record. In determining whether good cause or extraordinary cause exists, due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A request for a continuance filed within five days of a hearing shall be denied unless the reason for the request could not have been ascertained earlier.

- (1) "Good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is clearly necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to a new hearing date or the parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.
- (2) "Good cause" shall not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

(b) For the purpose of determining whether "extraordinary cause" exists to allow a final decision to be issued beyond 180 days after the commencement of a personnel case under G.S. 126-34.02(a) the phrase "extraordinary cause" is defined as follows: out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular, or of a customary kind. "Extraordinary cause" includes:

- (1) a stay issued by a federal or state trial or appellate judge;
- (2) a stay issued by an administrative law judge under G.S. 150B-33(a); or
- (3) a pending OAH civil rights investigation which addresses the same issues of discrimination as the subject matter of the contested case when the OAH investigation has not been pending in the Civil Rights Division longer than 90 days.

"Extraordinary cause" shall not be granted for any cause listed in Subparagraph (a)(2) of this Rule.

(c) A continuance for good cause shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

(d) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the administrative law judge shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient.

*History Note: Authority G.S. 126-34.02; 150B-33(b)(4);  
Eff. August 1, 1986;  
Amended Eff. November 1, 1987;  
Temporary Amendment Eff. March 1, 2014;  
Amended Eff. February 1, 2015;*



*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

**26 NCAC 03 .0119      SECURE LEAVE PERIODS FOR ATTORNEYS**

- (a) Any attorney may designate one or more secure leave periods each year as provided in this Rule.
- (b) Length, Number. A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule shall not exceed, in the aggregate, three calendar weeks.
- (c) Designation, Effect. To designate a secure leave period an attorney shall file a written designation containing the information required by Paragraph (d) with the Chief Hearings Clerk. The designation shall be filed:
  - (1) no later than 90 days before the beginning of the secure leave period; and
  - (2) before any argument or other proceeding before an administrative law judge has been scheduled for a time during the designated secure leave period.

Upon such filing, the secure leave period so designated shall be deemed allowed without further action by the presiding administrative law judge, and the attorney shall not be required to appear at any argument or other administrative proceeding during that secure leave period.

- (d) Content of Designation. The designation shall contain the following information:
  - (1) the attorney's name, address, telephone number and state bar number;
  - (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end;
  - (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule;
  - (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding; and
  - (5) a statement that no argument or other proceeding has been scheduled during the designated secure leave period in any matter pending before an administrative law judge in which the attorney has entered an appearance.

*History Note: Authority G.S. 7A-750; 150B-40(c);  
Eff. August 1, 2000;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

**26 NCAC 03 .0120      RIGHTS AND RESPONSIBILITIES OF PARTIES**

- (a) A party shall have all evidence to be presented, both oral and written, available on the date for hearing. In cases when the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the administrative law judge or agreed upon at a prehearing conference.
- (b) The administrative law judge shall send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, or other document to the administrative law judge shall simultaneously send a copy to all other parties.
- (c) All parties have the continuing responsibility to notify the Office of Administrative Hearings of their current address and telephone number.
- (d) A party may represent himself or herself or be represented by an attorney. If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.
- (e) With prior notice to the administrative law judge, any person may offer testimony or other evidence relevant to the case. Any nonparty offering testimony or other evidence may be questioned by parties to the case and by the administrative law judge.
- (f) Prior to issuing a decision, the administrative law judge may order any party to submit proposed findings of fact and written arguments.
- (g) The Administrative Law Judge may allow remote participation via audio or video conference by participant(s) subject to available services at the hearing location. Requests for remote participation shall be made at least seven days in advance and are subject to equipment, staff, and scheduling availability.
- (h) The administrative law judge shall not proceed to consideration of dispositive motions or a hearing on the merits in a contested case if an unrepresented party has notified the administrative law judge and the opposing party that the unrepresented party is seeking pro bono or reduced fee legal assistance, unless the administrative law judge has

determined that acquisition of such legal assistance by the unrepresented party is improbable based on the circumstances, such as the failure of the unrepresented party to procure legal assistance after multiple attempts.

*History Note:* Authority G.S. 7A-751(a); 150B-25; 150B-33; 150B-34;  
Eff. August 1, 1986;  
Amended Eff. October 1, 1991; April 1, 1990; November 1, 1987;  
Recodified from Rule .0119 Eff. August 1, 2000;  
Amended Eff. May 1, 2009; April 1, 2001;  
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge Augustus B. Elkins, II declared Rule 26 NCAC 03 .0120(d) void as applied in *Abundant Life Child Care Center, Tiffany D. Monroe v. Division of Child Development, June Locklear, Brenda Faircloth (08 DHR 2954)*;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. April 1, 2017.

### **26 NCAC 03 .0121 WITNESSES**

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the administrative law judge's own motion, the administrative law judge may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

*History Note:* Authority G.S. 150B-25(c)(d); 150B-33(4); 150B-37(b);  
Eff. August 1, 1986;  
Amended Eff. November 1, 1987;  
Recodified from Rule .0120 Eff. August 1, 2000;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

### **26 NCAC 03 .0122 EVIDENCE**

The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and G.S. 150B-29.

- (1) The administrative law judge may admit all evidence that has probative value. Irrelevant, incompetent, and immaterial or unduly repetitious evidence shall be excluded. An administrative law judge may, in his discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will:
  - (a) necessitate undue consumption of time; or
  - (b) create substantial danger of undue prejudice or confusion.
- (2) Contemporaneous objections by a party or a party's attorney are not required in the course of a hearing to preserve the right to object to the consideration of evidence by the administrative law judge in reaching a decision or by the court upon judicial review.
- (3) All evidence to be considered in the case, including all records and documents or a true and accurate photocopy, shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence incorporated by reference may be admitted only if the materials so incorporated are available for examination by the parties.
- (4) Documentary evidence in the form of copies or excerpts may be received in the discretion of the administrative law judge or upon agreement of the parties. Copies of a document shall be received to the same extent as the original document unless a genuine question is raised about the accuracy or authenticity of the copy or, under the circumstances, it would be unfair to admit the copy instead of the original.
- (5) The administrative law judge may take notice of judicially cognizable facts by entering a statement of the noticed fact and its source into the record. Upon timely request, any party shall be given the opportunity to contest the facts so noticed through submission of evidence and argument.
- (6) A party may call an adverse party or an officer, director, managing agent, or employee of the state or any political subdivision thereof or of a public or private corporation or of a partnership or

association or body politic which is an adverse party, and interrogate that party by leading questions and contradict and impeach that party on material matters in all respects as if that party had been called by the adverse party. The adverse party may be examined by that party's counsel upon the subject matter of that party's examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony.

*History Note:* Authority G.S. 150B-33(b)(4); 150B-29;  
Eff. August 1, 1986;  
Amended Eff. November 1, 1987; March 1, 1987;  
Recodified from Rule .0121 Eff. August 1, 2000;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

### **26 NCAC 03 .0123 OFFICIAL RECORD**

- (a) The official record of a contested case shall be available for public inspection upon request. An administrative law judge may, consistent with law, order all or part of an official record sealed.
- (b) The official record shall be prepared in accordance with G.S. 150B-37(a).
- (c) Contested case hearings shall be recorded either by a hearing assistant provided by the Office of Administrative Hearings or a court reporter listed by the North Carolina Administrative Office of the Courts as authorized and approved to prepare transcripts of proceedings held in the courts of all counties procured directly by one or more parties to the contested case.
- (d) If a contested case hearing is cancelled, the party responsible for the cancellation shall provide a 24-hour cancellation notice to the other parties in all cases in which a hearing assistant is provided by the Office of Administrative Hearings.
- (e) Transcripts of proceedings held in the Office of Administrative Hearings shall be made only upon request of a party. When proceedings are recorded by a court reporter, transcript requests shall be made directly to the court reporter. When proceedings are recorded by a hearing assistant, transcript requests shall be made directly to a transcriptionist listed by the North Carolina Administrative Office of the Courts as authorized and approved to prepare transcripts of proceedings held in the courts of all counties.
- (f) A party who orders a transcript shall use an Office of Administrative Hearings transcript form to order the transcript, which shall include the following information:
  - (1) case name and number;
  - (2) requestor information; and
  - (3) transcriptionist information.

That form is available on the Office of Administrative Hearings website at <https://www.oah.nc.gov> and may be obtained from the Chief Hearings Clerk upon request. The party ordering the transcript shall file the transcript form with the Office of Administrative Hearings and shall serve the transcript form on all other parties and the transcriptionist.

- (g) The transcriptionist shall deliver the transcript to the party or parties that requested the transcript and file the transcript with the Office of Administrative Hearings by email to [oah.clerks@oah.nc.gov](mailto:oah.clerks@oah.nc.gov) in PDF format no later than 30 days after having been served with the transcript contract.
- (g) Copies of recordings made by a hearing assistant are available upon written request at a cost set out in 26 NCAC 01 .0103.

*History Note:* Authority G.S. 7A-751; 150B-37;  
Eff. August 1, 1986;  
Amended Eff. August 1, 1998; April 1, 1990; February 1, 1989; November 1, 1987;  
September 1, 1986;  
Recodified from Rule .0122 Eff. August 1, 2000;  
Amended Eff. April 1, 2009;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. April 1, 2023; August 1, 2021.

### **26 NCAC 03 .0124 VENUE**

*History Note:* Authority G.S. 150B-24;  
Eff. August 1, 1986;  
Recodified from Rule .0123 Eff. August 1, 2000;  
Expired Eff. August 1, 2016 pursuant to G.S. 150B-21.3A.

#### **26 NCAC 03 .0125 CONDUCT OF HEARING**

Hearings shall be conducted, as nearly as practical, in accordance with the practice in the Trial Division of the General Court of Justice.

*History Note:* Authority G.S. 150B-25; 150B-33;  
Eff. August 1, 1986;  
Recodified from Rule .0124 Eff. August 1, 2000;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

#### **26 NCAC 03 .0126 HEARING OFFICER'S PROPOSAL FOR DECISION: EXCEPTIONS**

*History Note:* Authority G.S. 150B-34;  
Eff. August 1, 1986;  
Temporary Repeal Eff. August 26, 1987 For a Period of 120 Days to Expire on December 24, 1987;  
Temporary Repeal Eff. December 24, 1987 For a Period of 8 Days to Expire on January 1, 1988;  
Repealed Eff. January 1, 1988;  
Recodified from Rule .0125 Eff. August 1, 2000.

#### **26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION**

(a) An administrative law judge shall issue a final decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends.

(b) An administrative law judge's final decision shall be based exclusively on:

- (1) competent evidence and arguments presented during the hearing and made a part of the official record;
- (2) stipulations of fact;
- (3) matters officially noticed;
- (4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and
- (5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) An administrative law judge's final decision shall fully dispose of all issues required to resolve the case and shall contain:

- (1) a caption;
- (2) the appearances of the parties;
- (3) a statement of the issues;
- (4) references to specific statutes or rules at issue;
- (5) findings of fact;
- (6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;
- (7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law; and
- (8) a statement that each party has the right to file an appeal of the administrative law judge's final decision by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides, or, where applicable pursuant to G.S. 7A-29(a), a Notice of Appeal to the Court of Appeals.

(d) The chief administrative law judge may extend the 45-day time limit for issuing a decision. An administrative law judge who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

*History Note:* Authority G.S. 7A-751(a); 150B-34; 150B-47;  
Eff. August 1, 1986;  
Temporary Amendment Eff. August 26, 1987 For a Period of 120 Days to Expire on December 24, 1987;  
Temporary Amendment Eff. December 24, 1987 For a Period of 8 Days to Expire on January 1, 1988;  
Amended Eff. February 1, 1994; October 1, 1991; April 1, 1990; January 1, 1989;  
Recodified from Rule .0126 Eff. August 1, 2000;  
Amended Eff. April 1, 2001;  
Temporary Amendment Eff. January 1, 2012;  
Amended Eff. November 1, 2012;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**26 NCAC 03 .0128 EX PARTE COMMUNICATIONS**  
**26 NCAC 03 .0129 RECONSIDERATION OR REHEARING**  
**26 NCAC 03 .0130 AVAILABILITY OF COPIES**

*History Note:* Authority G.S. 7A-750; 7A-751(a); 150B-14; 150B-34; 150B-35; 150B-62(b); 150B-63(f);  
Eff. August 1, 1986;  
Amended Eff. January 1, 1991; November 1, 1987; January 1, 1987;  
Recodified from Rule .0127, .0128, .0129 Eff. August 1, 2000;  
Amended Eff. April 1, 2001;  
Expired Eff. August 1, 2016 pursuant to G.S. 150B-21.3A.

**26 NCAC 03 .0131 FINAL DECISIONS IN CONTESTED CASES**

A copy of a final decision issued by an administrative law judge shall be served on each party in accordance with Rule .0102(a)(3) and (b) through (f) of this Section.

*History Note:* Authority G.S. 150B-45;  
ARRC Objection Lodged November 17, 1988;  
Eff. April 1, 1989;  
ARRC Objection Removed Eff. April 1, 1990;  
Amended Eff. October 1, 1991; April 1, 1990;  
Recodified from Rule .0130 Eff. August 1, 2000;  
Temporary Amendment Eff. January 1, 2012;  
Amended Eff. November 1, 2012;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

**SECTION .0200 - MEDIATION SETTLEMENT CONFERENCE**

**26 NCAC 03 .0201 ORDER FOR MEDIATED SETTLEMENT CONFERENCE**

- (a) Order by Chief Administrative Law Judge. The Chief Administrative Law Judge may, by written order, require parties and their representatives to attend a pre-hearing mediated settlement conference in any contested case.
- (b) Timing of the Order. The Chief Administrative Law Judge may issue the order within 10 days of the filing of the contested case petition. Paragraph (c) of this Rule and Paragraph (b) of Rule .0203 of this Section shall govern the content of the order and the date of completion of the conference.
- (c) Content of Order. The Chief Administrative Law Judge's order shall:
- (1) require the mediated settlement conference be held in the contested case;
  - (2) establish a deadline for the completion of the conference;
  - (3) state that the parties have the right to select their own mediator as provided in Paragraph (a) of Rule .0202 of this Section;

- (4) state the rate of compensation of the mediator appointed by the presiding Administrative Law Judge pursuant to Paragraph (c) of Rule .0202 of this Section in the event that the parties do not exercise their right to select a mediator; and
  - (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise apportioned by the presiding Administrative Law Judge.
- (d) Motion to Dispense with Mediated Settlement Conference. A party may move the presiding Administrative Law Judge, within 10 days after the date of the Chief Administrative Law Judge's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the presiding Administrative Law Judge may grant the motion.
- (e) Motion for Mediated Settlement Conference. In contested cases not ordered to mediated settlement conference, any party may move the presiding Administrative Law Judge to order such a conference. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the presiding Administrative Law Judge within 10 days after the date of the service of the motion. Thereafter, the presiding Administrative Law Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling. In the event that mediation is ordered, the parties may select a mediator by agreement as provided in Paragraph (a) of Rule .0202 of this Section within 21 days of the date of the presiding Administrative Law Judge's order. If the parties cannot agree or have failed to select a mediator within the 21 days, the presiding Administrative Law Judge shall appoint a certified mediator pursuant to Paragraph (c) of Rule .0202 of this Section.

*History Note: Authority G.S. 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. October 1, 2009;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

## **26 NCAC 03 .0202 SELECTION OF MEDIATOR**

- (a) Selection of Certified Mediator by Agreement of Parties. The parties may select a certified mediator by agreement within 21 days of the Chief Administrative Law Judge's order. The petitioner or petitioner's attorney shall file with the Office of Administrative Hearings a Notice of Selection of Mediator by Agreement within 21 days of the Chief Administrative Law Judge's order, however, any party may file the notice. Such notice shall include: the name, address and telephone number of the mediator selected; the rate of compensation of the mediator; the agreement of the parties as to the selection of the mediator and rate of compensation; and that the mediator is certified pursuant to these Rules.
- (b) The presiding Administrative Law Judge shall appoint mediators certified by the Dispute Resolution Commission pursuant to Paragraph (c) of this Rule.
- (c) Appointment of Mediator by the presiding Administrative Law Judge. If the parties cannot agree upon the selection of a mediator, the petitioner or petitioner's attorney shall so notify the presiding Administrative Law Judge and request by motion, on behalf of all parties, that the presiding Administrative Law Judge appoint a mediator. The motion must be filed within 21 days of the date of the Chief Administrative Law Judge's order and shall state that the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the presiding Administrative Law Judge within 21 days of the Chief Administrative Law Judge's order, the presiding Administrative Law Judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate contested cases.
- (d) Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Office of Administrative Hearings shall prepare and keep current a list of certified mediators who wish to mediate contested cases. The list shall be kept in the Office of Administrative Hearings and made available to the parties upon request.
- (e) Disqualification of Mediator. Any party may move for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected by the parties or appointed by the presiding Administrative Law Judge pursuant to this Rule. Nothing in this Paragraph shall preclude mediators from disqualifying themselves.

*History Note: Authority G.S. 7A-751(a); 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. October 1, 2009; April 1, 2001;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

**26 NCAC 03 .0203 MEDIATION SETTLEMENT CONFERENCE**

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public building in the county where the contested case is pending. The mediator shall reserve a place and make arrangements for the conference and give timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. The Chief Administrative Law Judge's order issued pursuant to Paragraph (b) of Rule .0201 of this Section shall clearly state a date of completion for the conference. Such date shall not be less than 90 days or more than 120 days after the issuance of the Chief Administrative Law Judge's order. The Chief Administrative Law Judge may shorten these time limits in order to meet statutorily imposed deadlines for the hearing of certain types of contested cases.

(c) Request to Extend Date of Completion. A party, or the mediator, may request the presiding Administrative Law Judge to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator. The presiding Administrative Law Judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to hearing. Such order shall be served upon the parties and the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the recessed conference.

(e) The Mediated Settlement Conference Is Not To Delay Other Proceedings. The mediated settlement conference shall not be cause for the delay of other proceedings in the contested case, including the completion of discovery, the filing or hearing of motions, or the hearing of the contested case, except by order of the presiding Administrative Law Judge.

*History Note: Authority G.S. 7A-751(a); 150B-23.1; Eff. February 1, 1994; Amended Eff. April 1, 2001; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

**26 NCAC 03 .0204 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS**

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

- (1) All individual parties, or an officer or employee or agent of a party who is not a natural person who is not the party's outside counsel and who has been authorized to decide on behalf of the party whether and on what terms to settle the contested case; or in the case of a governmental entity, an employee or agent who is not the party's outside counsel and who has authority to decide on behalf of the party whether and what terms to settle the contested case; provided if under law proposed settlement terms can be approved only by a Board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that Board;
- (2) At least one counsel of record for each party or other participant whose counsel has appeared in the contested case; and
- (3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has authority to make a decision on behalf of the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have the decision-making authority.

(b) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Paragraph (c) of this Rule or an impasse has been declared. The party or person may have the attendance requirement excused or modified including the allowance of that party's or person's participation without physical attendance by order of the presiding Administrative Law Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator, or by agreement of all parties and persons required to attend and the mediator.

(c) Finalizing Agreement. If an agreement is reached in the conference parties shall reduce its terms to writing and sign it along with their counsel. By stipulation of one or more of the parties and at their expense, the agreement may

be electronically recorded. A consent judgment, voluntary dismissals, or withdrawal of petition shall be filed with the Office of Administrative Hearings by the persons the parties designate.

(d) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule .0207 of this Section.

*History Note: Authority G.S. 7A-751(a); 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. October 1, 2009; April 1, 2001;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

## **26 NCAC 03 .0205 SANCTIONS FOR FAILURE TO ATTEND**

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the presiding Administrative Law Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference as authorized by G.S. 150B-33(b)(8) or (10). A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the presiding Administrative Law Judge imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

*History Note: Authority G.S. 7A-751(a); 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. October 1, 2009; April 1, 2001;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

## **26 NCAC 03 .0206 AUTHORITY AND DUTIES OF MEDIATORS**

(a) Authority of Mediator.

- (1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.
- (2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
- (3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

- (1) The mediator shall define and describe the following at the beginning of the conference:
  - (A) The process of mediation;
  - (B) The differences between mediation and other forms of conflict resolution;
  - (C) The costs of the mediated settlement conference;
  - (D) The fact that the mediated settlement conference is not a hearing, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
  - (E) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
  - (F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
  - (G) The inadmissibility of conduct and statements as provided by Rule 408 of the North Carolina Rules of Evidence;
  - (H) The duties and responsibilities of the mediator and the participants; and
  - (I) The fact that any agreement reached will be reached by mutual consent.
- (2) Disclosure. The mediator shall be impartial and advise all participants of any circumstances bearing on possible bias, prejudice or partiality.
- (3) Declaring Impasse. It is the duty of the mediator to determine that an impasse exists, and that the conference should end.



- (4) Reporting Results of Conference. The mediator shall file a written report with the parties and presiding Administrative Law Judge within 10 days as to whether or not agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment, voluntary dismissal, or withdrawal of petition and shall identify the persons designated to file such pleadings. The mediator's report shall inform the presiding Administrative Law Judge of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission.
- (5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Chief Administrative Law Judge's order. Deadlines for completion of the conference shall be observed by the mediator unless said time limit is changed by a written order of the presiding Administrative Law Judge.

*History Note: Authority G.S. 7A-751(a); 150B-23.1; Eff. February 1, 1994; Amended Eff. October 1, 2009; April 1, 2001; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.*

### **26 NCAC 03 .0207 COMPENSATION OF THE MEDIATOR**

- (a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.
- (b) By Order. When the mediator is appointed by the Office of Administrative Hearings, the mediator shall be compensated by the parties at the uniform hourly rate and a one-time, per contested case, administrative fee, due upon appointment, as set by the Chief Administrative Law Judge except as provided by Paragraph (d) of this Rule. The Chief Administrative Law Judge shall set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.
- (c) Change of Appointed Mediator. Pursuant to Rule .0202 of this Section, the parties have 21 days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the presiding Administrative Law Judge has appointed a mediator, shall obtain approval from the presiding Administrative Law Judge for the substitution. If the presiding Administrative Law Judge approves the substitution, the parties shall pay the presiding Administrative Law Judge's original appointee the one time, per case administrative fee provided for in Paragraph (b) of this Rule.
- (d) Indigent Cases. No party found to be indigent by the presiding Administrative Law Judge shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these Rules shall waive the payment of fees from parties found by the presiding Administrative Law Judge to be indigent. Any party may move the presiding Administrative Law Judge for a finding of indigence and to be relieved of the obligation to pay that party's share of the mediator's fee. Such motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their contested case, subsequent to the conclusion of the contested case hearing but prior to the issuance of the Administrative Law Judge's decision. In ruling upon such motions, the presiding Administrative Law Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the contested case, and whether a decision was rendered in movant's favor. The presiding Administrative Law Judge shall enter an order granting or denying a party's request.
- (e) Postponement and Fees. As used in this Paragraph, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reason for the postponement, and a finding of good cause by the mediator. Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Paragraph (b) of this Rule. The Chief Administrative Law Judge will set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.
- (f) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the presiding Administrative Law Judge, mediator's fee shall be paid in equal shares by the parties. For purposes of this Rule,

multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference unless there is a pending motion for determination of indigency. In such case, payment shall be due upon a ruling on the motion.

*History Note:* Authority G.S. 7A-751(a); 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. October 1, 2009; April 1, 2001;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

#### **26 NCAC 03 .0208 MEDIATOR**

For purposes of this Section the term "certified mediator" shall mean a person who is currently certified as a mediator by the Administrative Office of the Courts pursuant to Rule 8 of Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, 329 N.C. 795, effective December 1, 1993 and as may be subsequently amended.

*History Note:* Authority G.S. 7A-751(a); 150B-23.1;  
Eff. February 1, 1994;  
Amended Eff. April 1, 2001;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

### **SECTION .0300 - EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES**

- 26 NCAC 03 .0301 ORDER DESIGNATING COMPLEX CONTESTED CASES**
- 26 NCAC 03 .0302 FACTORS TO BE CONSIDERED**
- 26 NCAC 03 .0303 VENUE**
- 26 NCAC 03 .0304 EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES**
- 26 NCAC 03 .0305 RULES AND PROCEDURES**

*History Note:* Authority G.S. 150B-31(b);  
Eff. April 1, 1997;  
Repealed Eff. November 1, 2012.

### **SECTION .0400 – SIMPLIFIED PROCEDURES FOR MEDICAID APPLICANT AND RECIPIENT APPEALS**

#### **26 NCAC 03 .0401 MEDICAID HEARING PROCEDURES RULES**

(a) The rules in 26 NCAC 03 .0100 apply to contested Medicaid cases commenced by Medicaid applicants or recipients under S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13 except:

- (1) 26 NCAC 03 .0101(b);
- (2) 26 NCAC 03 .0102(a)(3), (b) – (e);
- (3) 26 NCAC 03 .0103(a);
- (4) 26 NCAC 03 .0104;
- (5) 26 NCAC 03 .0106(b);
- (6) 26 NCAC 03 .0107;
- (7) 26 NCAC 03 .0108;
- (8) 26 NCAC 03 .0112;
- (9) 26 NCAC 03 .0115;
- (10) 26 NCAC 03 .0117;
- (11) 26 NCAC 03 .0118;
- (12) 26 NCAC 03 .0120(e);
- (13) 26 NCAC 03 .0123;
- (14) 26 NCAC 03 .0125; and
- (15) 26 NCAC 03 .0127(a).

(b) Nothing in this Rule affects discretionary powers granted to an administrative law judge as set out in G.S. 150B-33(b).

*History Note:* Authority G.S. 7A-751(a); S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13;  
Temporary Adoption Eff. December 2, 2008;  
Eff. August 1, 2009;  
Amended Eff. April 1, 2014; November 1, 2012;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;  
Amended Eff. September 1, 2023; October 1, 2022.

#### **26 NCAC 03 .0402 MEDIATION SETTLEMENT CONFERENCE RULES**

The rules in 26 NCAC 03 .0200 do not apply to contested Medicaid cases commenced by Medicaid applicants or recipients under S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13.

*History Note:* Authority G.S. 7A-751(a); S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13;  
Temporary Adoption Eff. December 2, 2008;  
Eff. August 1, 2009;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

#### **26 NCAC 03 .0403 EXPEDITED HEARINGS PROCEDURES FOR COMPLEX CONTESTED CASES**

*History Note:* Authority G.S. 7A-751(a); S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13;  
Temporary Adoption Eff. December 2, 2008;  
Eff. August 1, 2009;  
Repealed Eff. November 1, 2012.

### **SECTION .0500 – ELECTRONIC FILING**

#### **26 NCAC 03 .0501 DEFINITIONS**

In addition to the definitions contained in G.S. 150B-23.3, the following definitions apply to the rules in this Section:

- (1) "Electronic filing" or "filed electronically" means the electronic transmission of the petition, notice of hearing, pleadings, or any other documents filed in a contested case with the Office of Administrative Hearings by uploading to the case docket using the OAH electronic filing system (e-OAH) accessed through a link on the OAH website at [www.ncoah.com](http://www.ncoah.com).
- (2) "Electronic Filing Service Provider (EFSP)" means the service provided by the Office of Administrative Hearings for electronic filing and electronic service of documents by way of the Internet accessed through a link on the OAH website at [www.ncoah.com](http://www.ncoah.com).
- (3) "Electronic signature" or "signed electronically" means a graphic version of the e-OAH user's signature or "s/" followed by the e-OAH user's typewritten name. This shall be the legal equivalent of the e-OAH user's handwritten signature.
- (4) "Electronic service" or "served electronically" means the electronic transmission of the petition, notice of hearing, pleadings, or any other documents filed in a contested case with the Office of Administrative Hearings to an attorney, mediator, or party by means of the Electronic Filing Service Provider.
- (5) "Filed" means received by the chief hearings clerk of the Office of Administrative Hearings in e-OAH.

*History Note:* Authority G.S. 7A-750; 150B-23; 150B-23.3;  
Eff. March 1, 2016;  
Amended Eff. October 1, 2016.

#### **26 NCAC 03 .0502 GENERAL**

- (a) The Office of Administrative Hearings shall permit documents filed and served in a contested case to be filed and served electronically by means of the Electronic Filing Service Provider. All attorneys, mediators, and other parties using e-OAH shall register to use the system through a link on the OAH website at [www.ncoah.com](http://www.ncoah.com). All e-OAH users shall keep current their electronic mail address in e-OAH. When all attorneys and unrepresented parties to a contested case are registered in e-OAH, all documents filed and served in that contested case shall be filed and served electronically by means of the Electronic Filing Service Provider.
- (b) In contested cases filed in e-OAH, registration as an e-OAH user constitutes consent to electronic service and receipt of contested case documents, including a notice of hearing given by OAH, by means of the Electronic Filing Service Provider.
- (c) An e-OAH user shall be responsible for the readability of any document filed or served electronically by that user. Within five business days of receipt of an unreadable document filed or served electronically, the receiving party shall notify the sending party of the unreadability of the document.
- (d) Pleadings and other documents filed or served electronically shall contain the electronic signature of the attorney, mediator, or party who prepared the document and the preparer's name, mailing address, electronic mail address, and telephone number. Documents prepared by an attorney shall have the attorney's North Carolina State Bar number. An attorney registered as an e-OAH user in a non-Medicaid contested case shall electronically file a notice of appearance in that contested case. An attorney's electronic signature to a petition for a contested case filed electronically shall be that attorney's notice of appearance in that contested case.
- (e) Documents filed in e-OAH are filed when received by the chief hearings clerk of the Office of Administrative Hearings. Upon completion of filing, the clerk shall send the e-OAH user a confirmation receipt that includes the date and time of filing which shall be proof of filing.
- (f) Documents filed electronically after 5 pm shall be deemed filed at 8 am the following business day.
- (g) Documents filed in a contested case by an e-OAH user shall be filed electronically by means of the Electronic Filing Service Provider, shall be served electronically by means of the Electronic Filing Service Provider on all other attorneys or other parties registered in e-OAH in that contested case, and shall include a certificate of service.
- (h) A subpoena issued in a contested case by the chief hearings clerk of the Office of Administrative Hearings shall be signed electronically by the clerk.
- (i) In contested cases filed electronically, the applicable filing fee shall be:
- (1) forwarded by first class mail or overnight express mail contemporaneously with the electronic filing;
  - (2) paid personally to the chief hearings clerk of the Office of Administrative Hearings within five business days of the filing; or
  - (3) paid by electronic funds transfer.
- (j) If e-OAH experiences technical failure that prevents the Office of Administrative Hearings from receiving filings in e-OAH in accordance with the Rules in this Section, either continuously or intermittently over the course of any period of time that, after 12:00 noon on such day, amounts to more than one hour, filings due that day that were not filed due to technical failure shall become due the next business day. Such delayed filings shall be deemed timely filed if accompanied by a certification attesting to the e-OAH user's failed attempts to file electronically at least two times after 12:00 noon separated by more than one hour on each day that e-OAH experiences technical failure. If a document must be filed to meet a statutory deadline on a date that e-OAH experiences technical failure, the e-OAH user shall file that document with the Office of Administrative Hearings pursuant to Rule .0101(b) or Rule .0102(a)(2)(A) of this Chapter and shall serve that document pursuant to Rule .0102(a)(3) of this Chapter.

*History Note:* Authority G.S. 7A-750; 150B-23; 150B-23.2; 150B-23.3;  
Eff. March 1, 2016;  
Amended Eff. April 1, 2021; April 1, 2017; October 1, 2016.

## **26 NCAC 03 .0503 REGISTRANTS**

Only attorneys, mediators, and other parties associated with a contested case docket shall be permitted to register with e-OAH.

*History Note:* Authority G.S. 7A-750; 150B-23; 150B-23.3;  
Eff. March 1, 2016.

## **26 NCAC 03 .0504 INTEGRATION WITH OTHER RULES**

The rules in this Section are intended to supplement the other rules in this Chapter. In the event of a conflict, the rules in this Section shall control with respect to contested cases filed in e-OAH.

*History Note:* Authority G.S. 7A-750; 150B-23.3;  
Eff. March 1, 2016.